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STATE OF MICHIGAN
IN THE SUPREME COURT

***

Appeal from the Court of Appeals
The Honorable William C. Whitbeck, Peter D. O'Connell and Patrick M. Meter

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

vs.

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendants-Appellees.
_____/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

BRIEF ON APPEAL - APPELLEES ADELL CHILDRENS FUNDED TRUSTS

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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Professional Corporation

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Dated: February 10, 2005

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. The City of Novi attempted to take the Adells' property by eminent domain to build "A.E. Wisne Drive," a new driveway for the Adells' next-door neighbor, the Wisne Company. The City believed that, by declaring Wisne's driveway a "public road," its taking was automatically for a constitutional public use. After conducting a three-day bench trial, the trial court found that "overwhelming" evidence proved the City's proposed taking was for the private benefit of Wisne, and dismissed the City's action as unconstitutional. The Court of Appeals reviewed the trial record, held that a taking for a public road is not automatically for a public use, and affirmed the trial court's opinion in a unanimous published decision. Did the lower courts err in dismissing the City's condemnation action for lack of public use?

The trial court answers, "No."

The Court of Appeals answers, "No."

The Adell Defendants-Appellees answer, "No."

The City Plaintiff-Appellant answers, "Yes."

This Court should answer, "No."

II. The City never considered building Wisne's driveway on Wisne's own property because doing so could have jeopardized funding from the State and Wisne itself. Further, to obtain State funding, the City misrepresented that the Adells were donating their property for Wisne's driveway. The trial court held that the City's proposal, to take the Adells' land to build Wisne's driveway, lacked public necessity based on evidence of fraud, error of law, and/or abuse of discretion. The Court of Appeals affirmed, finding that, "Neither the city nor the county had seriously considered alternative access routes to the [Wisne] property other than taking the [Adells'] property for A.E. Wisne Drive."[1] Were the lower courts' dismissals for lack of public necessity "clearly erroneous?"

The trial court answers, "No."

The Court of Appeals answers, "No."

The Adell Defendants-Appellees answer, "No."

Plaintiff-Appellant answers, "Yes."

This Court should answer, "No."

[1] City of Novi v Robert Adell Children's Funded Trust (hereafter "Adell"), 253 Mich App 330, 346; 659 NW2d 615 (2002).

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OVERVIEW

No Michigan case supports the Appellant City of Novi's ("City's") theory that expropriations for public roads are always, "by definition,"[2] constitutional takings for public use. Acknowledging that fact in its trial brief, the City conceded that "there is no Michigan case directly on point."[3] The City now attempts to explain that dearth of authority, invoking the phrase that "some things are too plain to be written."[4]

It is not, however, that the City's proposition is too simple to publish. Rather, the City encounters a void of jurisprudential support because the theory itself is constitutionally unmeritorious. The City has requested application of an absolute rule -- that takings for roads are automatically for public use -- because this Court's historical requirement, compelling judicial review of **all** municipal assertions of public use, defeats the City's case. Both the trial court and Court of Appeals, the latter in a published decision by its Chief Judge, rejected the City's theory, dismissing its condemnation complaint for lack of public use and necessity.

Under the facts of this case, any standard other than application of the City's rigid rule warrants affirmation of the lower courts' opinions. As this Court will see, the City intended to construct a new driveway, to be called "A.E. Wisne Drive," which would run over the Appellees Adell Childrens Funded Trusts' ("Adells'") property, leading directly to the front door of the Adells' neighbor, the Wisne Company ("Wisne"). The City promised that, in exchange for a substantial payment from Wisne, it would declare "A.E. Wisne Drive" a public road, explaining that this public declaration "would allow the Wisne Company to have an access roadway (or driveway) that would never have to be maintained....This proposal has some

[2] City's brief at 16.
[3] Appellant's Appendix at 156a.

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substantial long term benefits for the Wisne Company."[5] When Wisne expressed concern that public ownership of the driveway would enable the general public to access Wisne's internal road system, the City's representatives confirmed "that this was not the intention. The roadway into [Wisne], although part of an overall community system, is really a private roadway that will perhaps benefit none other than [Wisne] and General Filters."[6]

The City's own engineers testified at trial that the very purpose of the proposed A.E. Wisne Drive was to create better access for Wisne.[7] Indeed, years before this case was filed, the State of Michigan refused to fund the A.E. Wisne Drive's construction because it appeared to be a "driveway" that "disproportionately benefited" private companies over the general public.[8]

Upon receiving the City's complaint proposing to seize their land for Wisne's driveway, the Adells filed a timely motion challenging public use and necessity. In response, the City identified one basis for its attempted taking: the A.E. Wisne driveway would replace Wisne's existing driveway onto Grand River Road, which was found to be hazardous in a study prepared for the City 15 years earlier. The undisputed trial evidence proved, however, that in a separate project, the Road Commission for Oakland County ("Road Commission" or "County") was closing Wisne's existing, hazardous driveway altogether. According to the City's own engineers, that closure would eliminate any conceivable safety issue.[9] The City's "safety" theory was unmistakably pretextual. In fact, after issuance of the Court of Appeals' decision, the County constructed a replacement driveway for Wisne, onto

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[4] City's brief at 14, citing People v Hurlbut, 24 Mich 44 (1877) (Cooley, J.) Justice Cooley penned that statement in a case that did not concern a road, or even a question of public use. Hurlbut involved questions of membership on a public works board.
[5] Appellant's Appendix at 105a (emphasis in original).
[6] Appellees' Appendix at 5b, submitted with Adells' trial brief as Exhibit F and used to refresh recollection at trial.
[7] Appellees' Appendix at 52b.

Grand River Road, using Wisne's own property.[10]

And yet, prior to trial, neither the City nor County had considered using Wisne's own land to build Wisne's replacement driveway. As explained below, the City's decision to take the Adells' land to replace Wisne's existing driveway was based not upon safety considerations, but rather upon the City's desire to obtain funding from, among others, Wisne itself.

Following a three day bench trial comprising testimony from twelve live witnesses and a persuasive chain of documents, the trial court ruled that, given "the overwhelming evidence before this Court, the Court finds that the proposed industrial spur, A.E. Wisne Drive, is primarily for the benefit of Wisne, which benefit predominates over those to the general public."[11] It therefore dismissed the City's condemnation complaint as unconstitutional. And with respect to the statutory necessity challenge, the trial court found that the Adells "met their burden of showing that Plaintiff City's actions evidence a lack of public necessity by fraud, error of law and/or abuse of discretion."[12]

In a unanimous decision authored by its Chief Judge, the Michigan Court of Appeals affirmed. Critically, with respect to the Adells' constitutional challenge to public use, the Court of Appeals applied two distinct analyses. It first applied prevailing public use standards that derive from Michigan Supreme Court decisions long pre-dating Poletown Neighborhood Council v Detroit.[13] The Court then applied the "instrumentality of commerce" analysis articulated by the dissenting Justice Ryan

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[8] Appellees' Appendix at 23b, 49b.
[9] Appellees' Appendix at 74b.
[10] The City fails to bring this fact to the Court's attention, and instead argues, without trial record support, that no replacement driveway could be accomplished absent the A.E. Wisne driveway. City brief at 37.
[11] Appellant's Appendix at 9.
[12] Appellant's Appendix at 9-10.
[13] 410 Mich 616; 304 NW2d 455 (1981); overruled by Wayne County v Hathcock, 471 Mich 445; 684 NW2d 765 (2004).

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in Poletown, which was later approved by this Court in Wayne County v Hathcock.[14] Under both alternative analyses, the Court of Appeals held, the City's attempted taking violated Michigan's Constitution.

The Court of Appeals also affirmed the trial court's dismissal for lack of public necessity, finding that, "Neither the city nor the county had seriously considered alternative access routes to the Wisne.... property other than taking the Adell Trusts' property for A.E. Wisne Drive."[15]

No Michigan case has ever held that a mere municipal declaration of public use automatically satisfies the Constitution. Each case cited by the City to suggest otherwise actually involved an exhaustive examination of the case's particular facts, thereby undermining the absolutist proposition that the City now requests on appeal. The trial court and Court of Appeals below were correct in declaring that the City's purported taking violated the constitutional public use limitation, and they did not "clearly err" in dismissing this action for lack of public necessity. The City's efforts to borrow cases from other areas of the law, including taxation, special assessments, and the police power, cannot resurrect its misguided effort to take the Adells' land by power of eminent domain to build Wisne's driveway. This Court should affirm.

COUNTER-STATEMENT OF FACTS

In its brief, the City identifies three particular facts that it deems most "critical"[16] to its appeal: first, that Wisne's then-existing driveway onto Grand River was hazardous, and that the Adells stipulated as such; second, that A.E. Wisne Drive would be publicly owned; and third, that "the road project was not part of a community or economic development scheme."[17] None of those three "facts" -- the third is

[14] 471 Mich 445; 684 NW2d 765 (2004).
[15] Adell, 253 Mich App at 346.

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actually a characterization of the facts -- can sustain the City's appeal.

As observed by both the trial court and Court of Appeals, the Adells stipulated to the inadequacy of Wisne's existing driveway onto Grand River because the Road Commission was closing that driveway as part of its Grand River Road and Bridge Improvement Project. As the City's lead engineer testified at trial, any safety problem would be entirely eliminated by closing that driveway.[18] In fact, the Road Commission recently constructed Wisne's replacement driveway onto Grand River Road using Wisne's own land. It was therefore the City's unlawful effort to seize the **Adells'** land for purposes of creating Wisne's **replacement** driveway, not the adequacy of the old driveway, that prompted the Adells' challenges to public use and necessity.

The City's second fact, that it intended to declare A.E. Wisne Drive a "public road," is also undisputed. However, as the Court of Appeals correctly held, "The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction."[19]

Third, the City's use of the term "scheme" is, to say the least, subject to interpretation. The facts which prompted the lower courts' disagreement with the City's interpretation, and which are now reviewed on appeal for clear error, are set forth below.

A. PROCEDURAL HISTORY

On September 4, 1998, the City filed this condemnation action in the Oakland County Circuit Court. The case was assigned first to the Honorable Robert Anderson, then to visiting Judge Phillip Jourdan, then to the Honorable Colleen O'Brien, and

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[16] City's brief at 1.
[17] City's brief at 1-2.
[18] Appellees' Appendix at 74b.
[19] Adell, 253 Mich App at 356.

finally to the Honorable Jessica R. Cooper.[20] The Adells filed a timely Answer to the City's Complaint, together with a Motion Challenging Public Purpose and Necessity and Requesting Discovery and Evidentiary Hearing.[21]

On July 19, 20, and 22, 1999, Judge Cooper presided over a bench trial on the Adells' challenges to public use and necessity.[22] On November 17, 1999, Judge Cooper issued a ten-page Opinion and Order dismissing the action:

> Applying heightened scrutiny to the overwhelming evidence before this Court, the Court finds that the proposed industrial spur, A.E. Wisne Drive, is primarily for the benefit of Wisne, which benefit predominates over those to the general public. The Court finds that [the Adell] Defendants met their burden of showing that Plaintiff City's actions evidence a lack of public necessity by fraud, error of law and/or abuse of discretion....As such, the Court finds that Plaintiff City's professed taking is unconstitutional. Const 1963, art 10, §2.[23]

In a unanimous published decision dated October 4, 2002, the Michigan Court of Appeals affirmed the trial court's ruling. By Order dated November 18, 2003, this Court held in abeyance the City's Application for Leave to Appeal, pending the Court's forthcoming decision in Wayne County v Hathcock, supra. By Order dated October 7, 2004, this Court granted the City's Application for Leave to Appeal.

B. FACTUAL BACKGROUND

1. The Ring Road

Novi has long experienced heavy traffic at the intersection of Grand River and Novi Roads. It therefore planned a new road, generally referred to as the "Ring Road"

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[20] The City correctly states in its brief (at 7-8) that the trial court did not conduct the trial within 30 days from the date that the Adells filed their Motion Challenging Public Purpose and Necessity. That fact is immaterial. First, the "hearing" mentioned in Section 6 of the Uniform Condemnation Procedures Act, MCL 213.56(1), does not refer to the trial itself. Rather, it refers to the initial hearing at which the owner "[asks] that the necessity be reviewed." Such a hearing was held within 30 days after service of the Complaint in this case. Obviously, the parties must be afforded time to conduct discovery, submit briefs, and the like. Further, the trial judge to whom this case was originally assigned - - Robert Anderson - - passed away shortly after this case was filed. A subsequent judge, Colleen O'Brien, ultimately recused herself, thereby further delaying the trial.

[21] The City's implication that the Adells challenged only public use, and not public necessity, is belied by the holdings in both lower courts' opinions and the title of the Adells' Motion "challenging public purpose and necessity." See Appellant's Appendix at 140a.

[22] The City urges that the trial actually lasted less than three full days and that the City's witness examinations were "short" because it preferred to confirm the "public nature of the road" rather than "rebut" the Adells' case. City's brief at 6. While the proofs are decidedly thin on the City's side, the Adells developed a comprehensive record before the trial court.

[23] Appellant's Appendix at 302a-303a.

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or "Crescent Boulevard," which would essentially form a ring around that congested intersection. Part of the Ring Road, which is to be constructed in phases, is depicted in Appellees' Appendix at 79b. The Adells have never challenged the legality of the Ring Road itself which, as the City concedes and the Court of Appeals held, could be constructed and used by the public irrespective of the A.E. Wisne Drive.[24]

2. The Private Entities Affected by This Condemnation

The Adells own the property commonly known as the Novi Expo Center in Novi, Michigan.[25] They lease that property to the Novi Expo Center, Inc.[26] Wisne, which is also known by the various names Progressive Tool & Industries Company, the acronym "PICO," and Novi Industries, owns an industrial facility on an adjacent parcel. The diagram submitted as Appellees' Appendix at 79b depicts the Adells' property and Wisne's property, as well as the City's proposed A.E. Wisne Drive running over the Adells' property and terminating at Wisne's front door. General Filters, Inc. ("General Filters") owns a third parcel of property that abuts the Wisne and Adell sites, and operates an industrial facility on that parcel.[27] Wisne and General Filters shared an old driveway onto Grand River Road which, at the time of trial, the Road Commission was planning to close as part of its Grand River Road and Bridge Improvement Project.[28]

3. The City's Argument That Wisne Would Be Landlocked

On September 4, 1998, the City filed this condemnation action to take part of the Adells' property for construction of the Ring Road and the A.E. Wisne driveway. At trial, the City argued that the Road Commission's closure of Wisne's then-existing driveway onto Grand River would actually "leave [Wisne] landlocked unless the [A.E.

[24] Adell, 253 Mich App at 346; Appellees' Appendix at 74b.
[25] Appellees' Appendix at 61b-62b.
[26] Appellees' Appendix at 63b.
[27] Like the Adells, General Filters had no desire for the proposed A.E. Wisne driveway. Appellees' Appendix at 58b-59b. In contrast to Wisne, General Filters refused to donate money for that driveway. Appellees' Appendix at 60b.

Wisne] industrial spur is constructed."[29] The trial evidence established, however, that Wisne possessed two means of access to its property: (1) the driveway onto Grand River Road that it shared with General Filters; and (2) access to Novi Road over the Adells' land pursuant to an easement agreement with the Adells. Both of Wisne's means of access are used every day.[30]

Its trial counsel having failed to establish that Wisne would be landlocked without the A.E. Wisne driveway, the City's appellate counsel (which substituted for the City's trial counsel) now states that the easement agreement itself was not put into evidence, so the City is uncertain as to the easement's precise scope or duration.[31] Of course, the City itself chose not to introduce the easement agreement for purposes of challenging its adequacy at trial, and cannot be heard to complain now. The City's assertion that Wisne would be "landlocked" absent A.E. Wisne Drive was untrue and dispelled at trial.

4. The Proposed Driveway Replacement

The City also argued that Wisne's driveway onto Grand River Road presented a hazard. The Adells stipulated[32] to that fact because the undisputed evidence confirmed that the Road Commission was closing that driveway altogether. Walter Schell, the Road Commission's Design Engineer, testified that the Road Commission was reconstructing the Grand River Bridge and portions of Grand River Road.[33] That reconstruction would remove Wisne's driveway onto Grand River Road.[34]

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[28] Appellees' Appendix at 69b-70b.
[29] Appellant's Appendix at 149a.
[30] Appellees' Appendix at 33b-34b, 36b-37b, 53b.
[31] Appellant's brief at 37.
[32] Appellees' Appendix at 76b-77b.
[33] Appellant's Appendix at 301a; Appellees' Appendix at 67b.
[34] Appellees' Appendix at 69b.

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Upon eliminating a private company's driveway, the Road Commission would ordinarily design and construct the replacement driveway using that company's own property.[35] In this case, however, the Road Commission elected **not** to design such a substitute because the City had promised to create Wisne's replacement driveway by taking the Adells' land:

> Q. Well, do the existing Road Commission plans show an elimination of the existing access for Wisne and General Filters?
>
> A. Yes, the current plans do show an elimination of that access point.
>
> * * *
>
> Q. Okay. Do the existing Road Commission plans show new access being created by the Road Commission for those properties?
>
> A. No, they do not.
>
> Q. [I]s that because the Road Commission has relied upon the city taking the Adells' property to create the Wisne drive?
>
> A. Yes.
>
> Q. Has the Road Commission as of this point, Mr. Schell, undertaken any study or analysis of how to replace access for Wisne or General Filters once their existing access is eliminated?
>
> A. No, we have not looked at that in any great detail.
>
> Q. Did you feel that Novi's proposed A.E. Wisne drive on the Adell's property eliminated the Road Commission's need to analyze new access for Wisne and General Filters using either or both of those companies' properties?
>
> A. Yes.
>
> Q. If the A.E. Wisne drive is not built, Mr. Schell, how would the Road Commission replace access for Wisne and General Filters?
>
> A. We have not thoroughly investigated every potential avenue for replacement of that approach.[36]

[35] Appellees' Appendix at 68b-69b, 71b.
[36] Appellees' Appendix at 69b-70b.

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The City's own engineers also testified that the City was attempting to take the Adells' land for the purpose of replacing Wisne's driveway that would be closed as a result of the Road Commission's Grand River Road and Bridge project:

> Q. You agree, Ms. Rowley, that the purpose of the proposed A.E. Wisne Drive is to give better access to Wisne and General Filters, right?
>
> A. Yes.[37]
>
> * * *
>
> Q: [S]o the City of Novi is attempting to take the Adells' property by eminent domain to create the Wisne driveway to replace access for Wisne and General Filters, right?
>
> A: Correct.[38]

In summary, the Road Commission's Grand River Road and Bridge project was closing Wisne's old driveway. Notably, the Road Commission possessed jurisdiction over Grand River Road, and therefore Wisne's then-existing access onto that road.[39] The City nevertheless advised the Road Commission that there was no need to replace the driveway, because the City would take care of it by seizing the Adells' land to create a replacement driveway for Wisne.

5. The City's Explanation

The City's explanation for the foregoing scenario was, and remains, safety -- a theory predicated on its 1984 Ring Road study. While the City has repeatedly expressed dismay at the minimal weight attributed to the study by the lower courts, the City's reliance on the study is self-defeating: it was undisputed at trial that the allegedly "hazardous" driveway referenced in the study was being closed. As a result, the City's lead engineer testified that any driveway "safety" issue was resolved:

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[37] Appellees' Appendix at 52b.
[38] Appellees' Appendix at 54b.
[39] Appellees' Appendix at 74b.

Q. If there is a safety problem at the existing access drive that those properties, Wisne and General Filters, use to get to Grand River that safety problem is eliminated by closing that access, right?

A. I would agree with that.[40]

The City's study was prepared 15 years before the trial in this action, at a time before the Road Commission's Grand River Road and Bridge project, and the accompanying driveway closure, were contemplated. The study was made before Wisne owned or operated its current facility in Novi,[41] and before the Novi Expo Center operated on the Adells' property.[42] When discussing means of acquiring and financing the future roads and driveways referenced in its text, the study mentioned the availability of various City powers but never -- not once -- eminent domain.[43] Yet, at the 1999 trial, and again now on appeal, the City invoked the 1984 study as an exclusive basis for its attempted taking, failing to heed the study's warning of 15 years earlier that additional review and study would be necessary before any of its ideas could be acted upon.[44]

6. The Puzzle

Even assuming that the outdated 1984 study would have otherwise carried weight at the 1999 trial, the Road Commission's promised closure of Wisne's driveway eviscerated the City's safety issue. Thus, rather than seizing the Adells' property for the A.E. Wisne Drive, why didn't the City simply rely on the Road Commission to do what it normally does in these cases which, as explained by the Road Commission's Mr. Schell (above), is to build a replacement driveway using Wisne's own land? Why did the City instead attempt to replace Wisne's driveway, over which the City had no

[40] Appellees' Appendix at 74b.
[41] City's brief at 36.
[42] Appellant's Appendix at 46a.
[43] Appellant's Appendix at 81a - 82a.
[44] Appellant's Appendix at 29a, 82a-83a.

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jurisdiction in the first place, by taking the Adells' private property? As explained below, and according to the "overwhelming evidence" presented at trial,[45] the City's unlawful taking was motivated by a plan to get money from, among others, Wisne itself.

7. The City Solicits Wisne

The City wished to finance its Ring Road project in two primary ways. As stated in the City's trial brief, "In addition to requesting funds from the [State] for the public improvements, Plaintiff [City] requested **private interests that would be benefited** by the improvements....to contribute to the cost of the improvements."[46] City representatives therefore approached Wisne on August 14, 1992, attempting to solicit money for a "proposed road that would be constructed for Novi Industries [Wisne's] benefit...."[47]

At a meeting one month later, however, Wisne expressed concern that the new driveway would enable the general public to access Wisne's internal road system. In response, City Manager Ed Kriewall and City Planner Michael Csapo (both of whom testified at trial), reassured Wisne that the driveway would be effectively private, only benefiting Wisne and General Filters:

> We were assured by Ed [Kriewall], John, Mike [Csapo] and Blair that this was not the intention. **The roadway into Novi Industries [a/k/a Wisne], although part of an overall community system, is really a private roadway that will perhaps benefit none other than Novi Industries [a/k/a Wisne] and General Filters** (emphasis added).[48]

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[45] Appellant's Appendix at 302a.
[46] Appellant's Appendix at 150a (emphasis added).
[47] Appellees' Appendix at 1b (emphasis added), submitted as Exhibit E to Adells' trial brief and used to refresh recollection at trial. As noted previously, Novi Industries and Progressive Tool, otherwise known as PICO or Wisne, are all one and the same company.
[48] Appellees' Appendix at 5b, submitted as Exhibit F to Adells' trial brief and used to refresh recollection at trial. When presented with this document at trial, City Planning Official James Wahl testified that he "recall[ed] some discussion regarding the possibility of it being a private road." Appellees' Appendix at 64b-65b.

Having "assured" Wisne that this was "really a private roadway that will perhaps benefit none other than Novi Industries [a/k/a Wisne] and General Filters," City Manager Kriewall asked Wisne to contribute money for the new driveway to be constructed over the Adells' land. Wisne agreed, promising to pay the City $200,000 for the driveway.[49] The driveway would be called the "A.E. Wisne Drive," in honor of Wisne, at Wisne's request.[50] By the City's admission, Wisne would have contributed nothing if the proposed driveway did not lead directly to Wisne's front door.[51]

8. The City Submits Its First Application For a State Grant

The State of Michigan maintains a Transportation Economic Development Fund.[52] These funds are limited, and the competition between municipalities for grants is intense. The fund administrator, Ms. Jacqueline Shinn, testified at trial that that the purpose of the fund is to address transportation needs for expanding companies, in this case Wisne.[53] Significantly, Ms. Shinn explained that the statute governing the State's economic development fund, and its commensurate criteria for awarding grants, have nothing to do with eminent domain: the fund administrator is concerned with the traffic needs and desires of expanding private companies, not with municipal efforts to expropriate property for public use.[54]

In 1992, the City submitted an application (No. 387) which it entitled, "Novi Industries" (a/k/a Wisne), seeking state funding to construct both the Ring Road and the Wisne Drive.[55] To support its funding application, the City identified problems that

[49]Appellees' Appendix at 19b-20b.
[50] Appellees' Appendix at 30b-31b.
[51] Appellees' Appendix at 18b-19b.
[52] Michigan Transportation Economic Development Fund Act, MCL 247.907 et. seq.
[53] Appellees' Appendix at 38b, 42b-44b.
[54] Appellees' Appendix at 40b.
[55] Appellees' Appendix at 48b-49b.

Wisne claimed to be experiencing with employee tardiness resulting from inadequate access.[56]

9. The State Denies Funding Because The A.E. Wisne Drive Is A "Driveway" Which "Disproportionately Benefits" Private Interests

The State denied the City's application for grant funding. Mr. Michael Csapo, Novi's then-staff planner, testified to the reason for the State's denial:

> Q. Mr. Csapo, the State informed you that the industrial spur disproportionately benefited three private properties to a greater degree than the general public, correct?
>
> A. Yes.[57]

Mr. Kriewall, Novi's then-City Manager, also confirmed that this was the basis for the State's refusal to provide the grant money:

> Q. The State of Michigan itself refused to fund Wisne Drive in part because it appeared to be a driveway, correct?
>
> A. That was their position.[58]

Thus, just as the City had previously assured Wisne, the State itself confirmed that the "industrial spur," i.e., "A.E. Wisne Drive," was effectively a private driveway. The State advised the City that if it wanted funding for the Ring Road, it would have to construct the Wisne driveway with local or private money, and not money from the State.[59]

10. The City Submits A New Application Misrepresenting that the Adells Are Donating Their Land for Wisne's Driveway

In 1993, the City submitted a new application (No. 465) to the State. Under the heading "Economic Development Project Name," the City inserted the title "Novi Industries" (a/k/a Wisne).[60] Unlike the previous application, which sought state funding for both the Ring Road and the Wisne driveway, the new application sought funding

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[56] Appellees' Appendix at 47b.
[57] Appellees' Appendix at 49b.
[58] Appellees' Appendix at 23b.
[59] Appellees' Appendix at 22b.

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only for the Ring Road. The City now proposed to construct the Wisne driveway with its own funds and private contributions of cash (the $200,000 Wisne had promised) and land.[61]

The State requires each city applicant to offer a local "match," in the form of cash, land, or construction, in support of a funding request. In its new application the City actually offered its "match" in the form of the proposed Wisne driveway itself -- i.e. the Adells' land.[62] The City's new grant application falsely represented to the State that the Adells (referred to as "EXPO" due to their ownership of the Novi Expo Center) and General Filters had agreed to donate their property as "ROW [right-of-way] donations" for the Wisne driveway.[63] In fact, the diagram that the City submitted with its application identified the Wisne driveway as the "Portion to be Installed by Private Entities."[64]

In early 1994, the State of Michigan accepted the City's new application, thereby agreeing to fund the Ring Road. The City now faced the difficult task of fulfilling its match obligation by constructing the Wisne driveway on the Adells' property, without the Adells' consent.

11. City Officials Confirm The Wisne Driveway's Private Purpose

Shortly after the State accepted Novi's second grant application, the City's no. 2 executive behind Mr. Kriewall, director of public works Anthony Nowicki, made a presentation to all of the engineering firms bidding on the design and construction of the Ring Road. Like Mr. Kriewall, Nowicki confirmed that the true purpose of the

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[60] Appellant's Appendix at 90a; Appellees' Appendix at 50b-51b.
[61] Appellant's Appendix at 87a.
[62] Appellant's Appendix at 87a; Appellees' Appendix at 28b-29b.
[63] Appellant's Appendix at 87a.
[64] Appellant's Appendix at 88a.

driveway was private, that it was included as the match in the City's grant application, and that without the driveway, the City would not have qualified for grant funding:

> They [the State] have some concerns with the way the Application was structured; some of it is ROW [right-of-way] donations, some of it is cash donations from various property owners, and as a means to get Category A Grant, we included the little private portion that runs from this Expo Drive extension all the way to Progressive Tool [Wisne] and services that facility. That was pulled from the project, and Progressive [Wisne] is to construct that on their own. MDOT has some concerns with whether or not Progressive [Wisne] will actually build this road because without it we do not qualify for the grant.[65]

12. The City Again Confirms the Private Nature of the A.E. Wisne Driveway

After Wisne had already committed $200,000, the City returned to ask for more. In a letter which both the trial court and Court of Appeals cited in their respective Opinions, City Manager Kriewall made another proposal: in exchange for an additional $174,000, the City would retain ownership of and maintenance responsibility for the driveway. Mr. Kriewall also made clear that, while the City would technically own the road, its fundamental character as Wisne's driveway would remain unchanged:

> I would propose that in addition to the $200,000 that your company has committed to as an up-front contribution to this project, that the additional $174,000 be paid to the City of Novi over 15 years at a nominal interest rate....**In exchange, the City of Novi would declare the roadway as a public street and accept all maintenance responsibilities. Due to a unique clause in our City Charter, the City of Novi, once we have accepted a public street under our jurisdiction, cannot specially assess for resurfacing or maintenance. This unique clause would allow the Wisne Company to have an access roadway (<u>or driveway</u>) that would never have to be maintained....This proposal has some substantial long term benefits for the Wisne Company.** Please advise as to your thoughts on the above proposal.[66]

[65] Appellant's Appendix at 102a.
[66] Appellant's Appendix at 105a (bold added; underlining in original).

13. The City Refuses to Consider Constructing the Wisne Driveway on Wisne's own Property

In a March 1998 public meeting with the City's engineers, the Adells suggested constructing the A.E. Wisne Drive on property owned by Wisne itself, or constructing the A.E. Wisne Drive as a private road. The City refused, stating that "[t]his may jeopardize funding...."[67] City Manager Kriewall also admitted that declaring the "industrial spur" a "private drive" could interfere with the City's funding strategy:

> Q. [L]et me throw out a suggestion and you tell me if I'm wrong .... [P]erhaps what they're getting at is, if you make it a private road, then Pico or Wisne has to maintain it, and if Pico has to maintain it, then maybe they won't give the $200 grand, to which [sic] the industrial spur doesn't get built, and without the industrial spur, you don't get the Ring Road. Is that what's going on here?
>
> A. [T]hat could be.[68]

Thus, for six years, the City's myopic focus was to build Wisne's driveway on the Adells' property. But after the Adells filed their motion challenging public purpose and necessity, the City instructed its engineers to "investigate the impacts on the grant funds if the industrial spur **driveway** was eliminated."[69] The City's engineers responded that no one had investigated replacing Wisne's driveway on Wisne's own property:

> If the industrial spur were deleted from the project, the [Road Commission] would have to investigate another location for the driveway due to that Grand River Avenue is being raised in this area as part of the Grand River Bridge reconstruction project.[70]

On the same date, the City's engineer wrote to the State's grant funding administrator, inquiring about the consequences of abandoning the City's Wisne driveway plan.[71]

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[67] Appellees' Appendix at 55b.
[68] Appellees' Appendix at 25b, citing Kriewall Dep. at p. 98.
[69] Appellees' Appendix at 10b.
[70] Appellees' Appendix at 10b.

14. The State of Michigan Rescinds The City's Grant

The State fund's administrator, Jacqueline Shinn, testified at trial that "Pico, Progressive, whatever we're referring to it today, was the primary reason for the grant application."[72] Wisne, however, was sold in 1999.[73] The State responded by rescinding the City's grant because "the development to be served" had "changed hands."[74] As a result of the State's grant rescission, even the Ring Road itself, to which the City wished to connect the A.E. Wisne driveway, was never constructed.

15. The Actual Driveway Replacement

The trial evidence showed, and the lower courts agreed, that due to the City's promise to take the Adells' land, neither the City nor the Road Commission properly considered replacing Wisne's driveway on Wisne's own land:

> There was also evidence, to which [the Adell] Defendants stipulated, that the current exit from the Wisne/PICO property onto Grand River Avenue created a hazardous situation for the Grand River traffic. However, the....Road Commission planned to eliminate this access road as part of the Grand River Bridge Improvement Project. The evidence indicated that the County had not planned an alternative access because it was relying on the City's taking of the Adell Trusts' property to create A.E. Wisne Drive....Neither the city nor the county [Road Commission] had seriously considered alternative access routes to the Wisne/PICO property other than taking the Adell Trusts' property for A.E. Wisne Drive.[75]

In addressing those findings, the City now proclaims, "If the new industrial spur drive were not built in the area proposed in the 1984 study, it would be inconceivable for the County to close the Grand River Road access. There is no way the County (or, later, the City) could simply just remove a public curb cut without an adequate

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[71] Appellees' Appendix at 10b, referencing letter to State.
[72] Appellees' Appendix at 46b.
[73] Appellees' Appendix at 44b.
[74] Appellees' Appendix at 44b.
[75] Adell, 253 Mich App at 346.

replacement - the costs could be staggering."[76] The facts on the ground defeat the City's statement. First, the City's allegation is unsupported, and unsupportable, by the trial record. To justify that void, the City asserts that it "agree[d] not to call the engineering and traffic safety experts who were available for testimony."[77] In fact, however, the City called both its lead engineer (Mr. Potter)[78] **and** its traffic safety expert (Mr. Stimpson)[79] at trial. **Neither** testified that a replacement driveway, using Wisne's own land, was impracticable.

Second, after the Court of Appeals issued its decision in this case (and perhaps even after this Court granted leave to appeal), the Road Commission replaced Wisne's driveway onto Grand River Road using Wisne's own land. A December 22, 2004 aerial photograph of the new driveway is submitted as Appellees' Appendix 80b. Obviously, this photograph was not part of the trial record because the new driveway did not exist at the time of trial. That the City's brief to this Court actually contends that, absent A.E. Wisne Drive, the old driveway could not be replaced on Wisne's land, is unsupportable.

In summary, it is difficult to digest the City's oft-repeated contention that the facts of this case represent the most ordinary governmental functions, actually praising its City Manager for "doing what any responsible public official should do,"[80] and claiming that this was merely a commonplace condemnation exercise for a "traditional public infrastructure improvement."[81] The plausibility of those characterizations were effectively rejected by Novi's own City Manager, Mr. Kriewall, at trial:

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[76] City's brief at 37.
[77] City's brief at 6.
[78] Appellees' Appendix at 73b.
[79] Appellees' Appendix at 75b.
[80] Appellant's brief at 46.
[81] City's brief at 48.

Q. [M]y question is if you can ever recall the City....taking by eminent domain the property of a private owner to create improved access to one or two other private owners?

* * *

A. I'm trying to think. There's so many projects. No. This is probably unique.[82]

COUNTER-STATEMENT OF STANDARD OF REVIEW

The Adells agree that constitutional issues, such as their challenge to public use, are subject to review *de novo*. See Wayne County v Hathcock.[83] But the City's brief takes this Court's separate statement in Hathcock -- that the Court "may vacate an agency's finding....[of].... public necessity only if a party establishes that the finding is predicated on 'fraud, error of law, or abuse of discretion'"[84] -- to mean that a **public necessity** decision is also reviewed *de novo*. The City's implication is incorrect. When reviewing a trial court's dismissal of an action for lack of public necessity based upon fraud, error of law, or abuse of discretion, an appellate court "will not reverse the findings and conclusions of the trial court in [such] a condemnation case unless they are clearly erroneous." Nelson Drainage Dist. v Filippis,[85] citing Livingston Co Road Comm'rs v Herbst[86] and Muskegon v Irwin;[87] City of Troy v Barnard.[88]

ARGUMENT

I. THE CITY'S DECISION TO DECLARE WISNE'S DRIVEWAY A "PUBLIC ROAD" DOES NOT AUTOMATICALLY QUALIFY THE DRIVEWAY AS A CONSTITUTIONAL PUBLIC USE

The foregoing factual record, and the lower courts' opinions based thereon, weigh heavily against the City's cause. The City therefore asked the trial court, the Court of Appeals, and now this Court, to apply an absolute rule to sustain its

[82] Appellees' Appendix at 34b-35b, citing Kriewall Dep. at p. 77.
[83] 471 Mich 445; 684 NW2d 765 (2004).
[84] Id.
[85] 174 Mich App 400, 403; 436 NW2d 682 (1989).
[86] 38 Mich App 150,154; 195 NW2d 894 (1972).
[87] 31 Mich App 263, 270; 187 NW2d 481 (1971).
[88] 183 Mich App 565, 569; 455 NW2d 378.

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attempted taking. As it did below, the City contends that "public roads are, by definition, public uses,"[89] and that the existence of statutory authority to build public roads "should end the public use inquiry as a matter of law."[90] Both the trial court and Court of Appeals rejected the City's argument because no Michigan case has ever held that "public roads," as a narrow class, are somehow excepted from judicial review on questions of public use.

In every condemnation case, involving roads or otherwise, it is left to the courts to determine whether the particular taking is for public, or private, use. Const. 1963, art. 10 §2 states that, "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Interpreting that constitutional mandate, this Court has repeatedly confirmed that, "The question of whether the proposed use is a public use is a judicial one."[91] A municipal assertion that a taking is for public use does not make it so. Justice Cooley emphasized that, in cases of eminent domain, a municipal declaration of public use, while certainly meaningful, is never immune from judicial review:

> The question what is a public use is always one of law. Deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, but it will not be conclusive.[92]

As this Court recently reiterated in Hathcock, whether a proposed taking is "consistent with the Constitution's 'public use' requirement [is] a constitutional question squarely within the Court's authority."[93]

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[89] City's brief at 16.
[90] City's brief at 17.
[91] Lakehead Pipeline Co. v Dehn, 340 Mich 25, 39-40; 64 NW2d 903 (1954), citing Cleveland v City of Detroit, 322 Mich 172, 179; 33 NW2d 747 (1948).
[92] 2 Cooley, Constitutional Limitations, (8th Ed), p. 1141.
[93] Hathcock, supra at 480.

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Indeed, in numerous instances, this Court has dismissed attempted condemnation seizures, as violative of the constitutional public use limitation, even where the taking was authorized by statute. See e.g., Wayne County v Hathcock;[94] Shizas v City of Detroit;[95] Berrien Springs Water-Power Co. v Berrien Circuit Judge.[96] The City thus declares that, "There is **no case** decided by any court in the history of this state that holds that property taken by eminent domain to be in the ownership and control of the public **and** available to the use of the general public constitutes anything other than a public use."[97] The City's assertion goes to the heart of this appeal, and it is erroneous.

A. Public Ownership Alone Does Not Satisfy the Public Use Inquiry

This Court has held in appropriate situations that continued ownership of taken land by, and availability of use to, the public is not alone sufficient to satisfy the public use inquiry. In Shizas v City of Detroit,[98] the city wished to take plaintiff's property by eminent domain to create public parking decks in an area sorely in need of parking. The city planned to lease the ground floors of the structures for retail use, but unlike the facts of Poletown, supra and Hathcock, supra, the city in Shizas was statutorily obligated, and fully intended, to retain ownership of the entire taken property "for use of the public."[99] Like takings for public roads generally, the Shizas taking was based upon both a statutory grant of right, and a municipal resolution of necessity.

In discussing many of the cases cited again by the parties on appeal today, this Court in Shizas rejected the city's taking. The Court held that, although the city would retain ownership of all the taken property, the taking was at least partially pursued for

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[94] 471 Mich 445; 684 NW2d 765 (2004).
[95] 333 Mich 44; 52 NW2d 589 (1952).
[96] 133 Mich 48; 94 NW2d 379 (1903).
[97] City's brief at 22 (emphasis in original).
[98] 333 Mich 44; 52 NW2d 589 (1952).

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the benefit of private parties: "Where....the intention to confer a private use or benefit forms the *purpose or a part of the purpose* of the proceeding or taking the power of eminent domain may not be exercised."[100]

Therefore, public ownership was not conclusive in Shizas, and the case was dismissed. The City of Novi attempts to distinguish Shizas on one basis only: the project at issue there was not a road. But that distinction assumes a false premise, namely, that on questions of public use, there exists an exception to the rule of judicial review for cases involving public roads. The City's professed distinction does not exist in the law.

The Shizas holding represents a resonant analogy to the present case. While the City of Novi would retain ownership of all land taken from the Adells, the purpose of A.E. Wisne Drive was to confer a benefit upon Wisne. The trial evidence from all angles, including testimony from City Manager Kriewall, the City's engineers, the City's staff planner Mr. Csapo, City director of public works Nowicki, the State fund administrator, and the documentary exhibits, repeatedly confirmed that unmistakable point.

Moreover, like the Shizas court's discussion of the publicly owned parking decks and the publicly owned ground floors in those structures (observing the more "public" nature of the former and the "private" attributes of the latter), so too did the lower courts in this case distinguish between the City's Ring Road itself and the private benefits attendant to A. E. Wisne Drive.[101]

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[99] Shizas, 333 Mich at 47.
[100] Id. at 54 (emphasis in original).
[101] Adell, 253 Mich App at 352.

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Both the Court of Appeals and this Court again rejected the argument that retention of formal municipal ownership ends the public use inquiry in City of Lansing v Edward Rose Realty, Inc.,[102] the first case cited in the City's trial brief.[103] In that case, like the City of Novi's signed resolution to "complete the 'Ring Road' and related access roads" to accommodate "economic development" and the "expansion of [Wisne] Progressive Tool,"[104] the City of Lansing passed a municipal resolution to provide cable access to apartment buildings, declaring cable access to be in the public good. Like Wisne's promise to pay for A.E. Wisne Drive, Continental Cablevision, a private company, promised to indemnify Lansing for its condemnation efforts.[105] Like Novi's resolution of necessity for Wisne's driveway access, Lansing passed a resolution of necessity to permit condemnation for cable access.[106] And in both cases, the condemnor cities proposed to proceed under the Home Rule City Act.[107]

Recognizing that Lansing intended to maintain ownership of the cable access easements, rather than transferring that property to Continental, the trial court permitted Lansing's taking. The Court of Appeals reversed:

> We think that the trial court's position represents an overly narrow view....In this case, the proposed easement would directly benefit Continental Cablevision by giving it the ability to reach potential new customers....The easements would be made available to Continental Cablevision and the City would be fully indemnified by Continental Cablevision....**The easements thus would be the City's in name only**.[108]

This Court granted Lansing's application for leave to appeal, but affirmed the Court of Appeals. Like the City in the present case, Lansing urged reliance on certain other states' treatment of the constitutional issue, but this Court responded that "we

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[102] 119 Mich App 551; 481 NW2d 795 (1992); aff'd, 442 Mich 626; 502 NW2d 638 (1993).
[103] Appellant's Appendix at 151a.
[104] Appellant's Appendix at 177a.
[105] Edward Rose, 442 Mich at 629.
[106] Id. The language of Lansing's resolution, when compared to Novi's resolution in this case, is very similar.

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are not persuaded" by those foreign interpretations.[109] Instead, this Court ruled that the City's mere retention of ownership was insufficient to satisfy the constitutional public use requirement:

> Although the City will retain ownership of the easement it proposed to obtain through condemnation, Continental will receive more than an incidental benefit.
>
> ***
>
> We agree with the conclusion by the Court of Appeals that the requirement of universal service is not, in and of itself, a public purpose....If the service does not further a public purpose, then universal provision of that service does not advance a public purpose.[110]

The foregoing passage is extraordinarily similar to the Court of Appeals' rationale in the present matter:

> The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction.[111]

This Court's final paragraph in Edward Rose also strikes a familiar cord in Judge Whitbeck's opinion in this case:

> The conduct by the city....benefits Continental, a specific and identifiable private interest. We are persuaded that this benefit to Continental predominates over the asserted public benefits. The ordinance and resolutions are therefore invalid as unreasonable because the public would not be the primary beneficiary. Hence, the proposed conduct is beyond the city's authority to exercise the power of eminent domain. The decision of the Court of Appeals is affirmed.[112]

The lower courts in this case undertook an identical analysis of A.E. Wisne Drive. In light of Shizas and Edward Rose, the City is mistaken in claiming that public ownership alone satisfies the constitutional public use requirement. As set forth below,

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[107] MCL 117.1 et. seq.
[108] Edward Rose, 192 Mich App at 555 (emphasis added).
[109] 442 Mich at 636.
[110] Id. at 639-640.
[111] Adell, 253 Mich App at 356.
[112] Edward Rose, 442 Mich at 644.

the City's dependent theory, that public roads constitute an exception to the requirement of judicial review on questions of public use, is likewise incorrect.

B. This Court has Never Held that Public Roads Are Excepted from Judicial Review on Questions of Public Use

The City contends that, because various state statutes identify public roads as projects for which cities may exercise eminent domain, public roads are automatically public uses: "Other statutory provisions also directly or by necessary implication confirm that public roads are, by definition, public uses."[113] As the Court of Appeals held in this case, the City is legally wrong. There is simply no Michigan case classifying a particular use, roads or otherwise, as being immune from judicial scrutiny on the constitutional question of public use. The City's argument to the contrary is based upon cases which, as stated by the Court of Appeals below, actually confirm the case-by-case factual analysis applicable to all public use questions, including roads.

1. Michigan Authorities Concerning Takings for Roads Support the Lower Courts' Opinions

The City relies upon Rogren v Corwin,[114] which involved a public road installed on defendant's property, terminating at plaintiff's property. The record established that the proposed road would provide public access to a village called "Hobart," which included a railroad station, a store, a schoolhouse, and a post office.[115] Consistent with Judge Whitbeck's discussion of the "fog of terminology" sometimes evident in Michigan case law's usage of the terms "public use," "public purpose," and "public necessity,"[116] Rogren is either a case involving public necessity or one in which the Court used the terms "public necessity" and "public use" interchangeably. In any event, what is clear is that the entire "public versus private" dispute in Rogren was

[113] City's brief at 16.
[114] 181 Mich 53; 147 NW2d 517 (1914).

resolved by an exhaustive analysis of the case's facts, not by an unbending rule that public roads are automatically public uses:

> Testimony was taken pro and con in relation to the public necessity of establishing the highway as proposed. At the close of the testimony it was agreed between counsel, in open court, that the issue before the jury should be restricted to the question as to whether there was or was not a public necessity for the opening of the proposed highway....[117]

The City's implication to this Court, that Rogren stands for a sweeping proposition that takings for public roads are *per se* takings for public uses, is erroneous. In fact, while the Rogren court observed that a road need not terminate on public property at both ends to satisfy public necessity, it underscored the factual analysis necessary to determine the taking's lawfulness. Citing to the trial court's instructions, the Court unambiguously stressed the factual, case-by-case nature of such inquiries:

> Now, public necessity is distinguished from a private necessity. If the public is interested in this road to such an extent that it makes it necessary to open it up, then it is necessary from a public standpoint. If the only person interested in it is a private individual, then there is a private necessity only, so you can see that there is a wide range between a private necessity and a public necessity, and it still leaves it to you as a question of fact to be determined from the evidence here on the witness stand, whether or not the testimony in these proceedings has brought it within the definition of a public necessity.[118]

The City turns Rogren on its head. Citing to a West Virginia case,[119] Rogren went out of its way to explain that, *even* where a road serves only limited persons, it may still satisfy public necessity. But the City takes that to mean that takings for **all** such roads are *per se* lawful, and that is precisely what Rogren stands against: "[I]t all

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[115] Id. at 55.
[116] Adell, 253 Mich App at 341-342.
[117] Id. at 55. At the time of Rogren, juries decided questions of both damages and public necessity. See discussion in State Hwy. Comm'n v Vanderkloot, 392 Mich 159, 170-171; 220 NW2d 416 (1974).
[118] Id. at 55-56.
[119] Varner v Martin, 21 W. Va. 534 (1883).

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comes back to the question of fact to be determined from the evidence in the case."[120]

In this light, the Adells agree with the City that, "The analysis in Rogren fits cleanly in this case."[121] The trial court below had a unique opportunity to evaluate the testimony and credibility of a dozen witnesses and the documents underlying this matter. While the jury in Rogren, and the bench in this matter, reached opposite conclusions about the public's use and need for a proposed road, that is the nature of a case-by-case investigation involving different factual scenarios. In this regard, A.E. Wisne Drive would hardly create access to a post office, railroad station, or schoolhouse, all of which were present in Rogren.

The other two cases cited by the City, Fields v Colby[122] and Detroit Int'l Bridge Co. v American Seed Co.,[123] were discussed at length, and soundly distinguished, in the Court of Appeals' opinion below. Fields itself evidences five crucial distinctions, any one of which separate it from this case. The first distinction is dispositive. The plaintiff in Fields sought to enjoin the commissioner from laying out a highway. The commissioner's answer asserted that the highway was necessary and that no false representations were made to him.[124] Then, due to a procedural irregularity (the trial record was not "settled" before proceeding to the Supreme Court),[125] the Fields court was required to make its decision based upon those pleadings alone. And because the plaintiff failed to file "exceptions" to the material averments in the commissioner's answer, the answer was taken as true and the plaintiff's "bill must fail."[126] Here, of course, a full factual record was made in the trial court, so the Court of Appeals correctly treated Fields as "at best....a procedural decision, within the context of the

[120] Rogren, 181 Mich at 56.
[121] City's brief at 23.
[122] 102 Mich 449; 60 NW 1048 (1894).
[123] 249 Mich 289; 228 NW 791 (1930).
[124] Fields, 102 Mich at 452-54.

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rules of pleading as they existed at that time, to accept the commissioner's answer as both accurate and determinative."[127]

Second, the road in Fields was desired by various landowners who claimed not only that they were landlocked, but further, that they were "forbidden" from using the plaintiff's land for access.[128] Conversely, the City failed to make its case at trial that Wisne would be landlocked absent A.E. Wisne Drive. Wisne, moreover, is not "forbidden" from using the Adells' property at all: it is undisputed that Wisne enjoys an express easement to do so.

Third, the highway commissioner in Fields "determined the question of whether said highway was the best and most feasible one for a highway to said premises and determined that it was."[129] Again, that finding paints a bold contrast to this case, where "neither the city nor the county had seriously considered alternative access routes to the [Wisne] property other than taking the Adell Trusts' Property for A.E. Wisne Drive."[130]

Fourth, based on the pleadings, the Fields court found that no fraud had occurred. In contrast, here the City presented an application for funding to the State of Michigan, asserting that the Adells were donating their property for the A.E. Wisne Drive. That allegation -- made for the purpose of obtaining funding for a project for which the City actually intended to forcibly take the Adells' property -- more than justified the trial court's reference to fraud in this case.

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[125] Fields, 102 Mich at 450.
[126] Id.
[127] 253 Mich App at 351. Under the UCPA, MCL 213.56 (which was enacted many years after the Fields decision), a condemning authority's mere denial of an alleged fraud would not be sufficient to overcome a necessity challenge. To that extent, the procedural holding in Fields has been superseded by statute.
[128] Fields, supra at 451, 453.
[129] Fields, 102 Mich at 453-54.
[130] Adell, 253 Mich App at 346.

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Finally, like Rogren, supra, a trial occurred in Fields. As the Court of Appeals in this case put it, "Fields echoes the sentiment that a highway or street is not automatically a public use for land the government takes,"[131] and "Rather clearly, the situation in Fields is not overly similar to the facts of this case."[132]

Nor does American Seed stand for a hard-and-fast rule that a public road is automatically a public use. The American Seed plaintiff was a private entity organized for the purpose of constructing and operating the Ambassador Bridge across the Detroit River. As a threshold matter, the City's attempt to equate the largest international suspension bridge in the world with the A.E. Wisne Drive seems strained, to put it mildly, and only serves to underscore the fundamental difference between a taking that is for public use and one (like this) that is undertaken for a private benefit.

At issue in American Seed was the right of the legislature to confer upon certain classes of private citizens the power of eminent domain, not whether a road -- or any other use -- automatically qualifies as "public" for constitutional purposes. Interestingly, the American Seed court found that, in certain instances, such entities may act as "trustees" for the public. But the court further emphasized that the right of eminent domain "can never be exercised for private purposes," a principle identified by the Court of Appeals below as a key distinction between American Seed and this case.[133]

The City clearly cites American Seed for its theory that a public road is "by definition public."[134] Discussing that case (and another on which American Seed relied),[135] the Court of Appeals succinctly stated, "We do not view that case as standing for the proposition that constructing a railroad, street, or highway is always

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[131] Adell, 253 Mich App at 350.
[132] Adell, 253 Mich App at 351.
[133] 253 Mich App at 349.
[134] City's brief at 24.
[135] Swan v Williams, 2 Mich 427; 228 NW 791 (1852).

for a public purpose."[136]

Finally, and pointedly, this Court in American Seed noted that, "When employed in a statute, there is no doubt of the meaning of the word 'highway,' unless, as sometimes happens, the context plainly shows a perversion of use."[137] The City's attempt to take the Adells' private property, on the sole basis that it would call the A.E. Wisne driveway a "public highway," demonstrates precisely such a perversion of use.

The City's position on appeal -- that a taking for a public road is by definition for public use and therefore beyond review -- is unsupported by the case law of this State.[138]

2. Foreign Authorities Concerning Takings for Roads Support the Lower Courts' Opinions

No Michigan case holds that a taking for a public road is always and by definition for public use. The City therefore casts its net to other jurisdictions. But as the Court of Appeals observed, in every instance where a foreign decision, or a treatise excerpt, makes the unremarkable and undisputed point that public highways are the most common projects for which eminent domain may be exercised, room is made for exceptions.

Take Nichols on Eminent Domain, for example, cited at length in the City's brief. In one instance, Nichols states that, "The public highway is unquestionably for a public use and may be established by eminent domain even if one person uses it, so long as that person uses it as a member of the public."[139] But then, Nichols goes on to explain that, "A taking need not benefit a large number of people in order for the taking to be

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[136] Adell, 253 Mich App at 349.
[137] American Seed, 249 Mich at 295.
[138] Beyond Rogren, Fields, and American Seed, the City offers only a string citation to several cases which, even under the most liberal reading, cannot be interpreted to address the City's proffered principle, let alone resolve it in the City's favor. Rogers v Allen, 246 Mich 501; 224 NW 632 (1929); Johnson v Fred L. Kircher Co., 327 Mich 377; 42 NW2d 117 (1950); In Re: Opening of Gallagher Ave, 300 Mich 309; 1 NW2d 553 (1942); and In Re: Widening of Woodward Ave, 297 Mich 235; 297 NW2d 468 (1941).
[139] 2A, Nichols on Eminent Domain, (3d Ed. Rev), §7.03 (4), p. 7-44 (1999).

considered for a public purpose, but a benefit to one person is not sufficient."[140] Similarly, according to Nichols, "An acquisition which is primarily for private benefit is not for a public use."[141]

Perhaps most directly, Nichols states that, "Private property may be taken for a **public highway if it serves a valid public use.**"[142] Thus, according to this treatise, which the Court of Appeals addressed in its decision below, the City's absolutist proposition is wrong. No one disputes the notion that, in most instances, a taking for a public highway will satisfy the constitutional public use limitation. But the Adells strongly dispute the City's contention that the rule is absolute.

The City likewise relies upon various statements by Professor Richard A. Epstein, but Mr. Epstein argues that "even private highways (e.g., toll roads) can constitute a public use."[143] Professor Epstein, therefore, advocates the position rejected in Tolksdorf v Griffith,[144] where this Court declared unconstitutional the "Opening of Private Roads and Temporary Highways Act" (the Private Roads Act),[145] as condoning an unlawful taking for private use.

The City cites several foreign cases in its brief at pp. 30-31, but they all stand for the simple proposition that takings for public roads are typically appropriate. More importantly, if any of those cases could be read for the notion that takings for public roads are *per se* lawful, then they would be inconsistent with Michigan's longstanding rule that municipal assertions of public use are always subject to judicial review. Of course, for every foreign case cited by the City to sustain a general proposition, a clearer case exists to illucidate the exception.

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[140] Id. at §7.02(4) p. 7-71.
[141] Id. at §703(5)(d) p. 7-49.
[142] Id. at §7.06(4)(b), p. 7-122 (emphasis added).
[143] City's brief at 29.
[144] 464 Mich 1; 626 NW2d 163 (2001).

The North Carolina Supreme Court's decision in State Highway Commission v Batts,[146] is such a case. In Batts, the state condemned part of one landowner's property in order to construct a 3,316-foot road that would begin on a secondary road and end in a cul-de-sac at the house of another landowner.[147] The defendant landowner challenged the taking on the ground that its purpose was to serve the private interests of the property owners at the end of the road, and three other houses on the same road in which relatives of those property owners resided.

On appeal, the North Carolina Supreme Court noted that "[t]he only persons who would use the proposed road, other than [the owners of the property at the end of the road] and their relatives, would be persons having business or social relations with them."[148] The court concluded that "all the evidence in the record clearly shows" that the dead-end road "would be for the dominant use and benefit of [the cul-de-sac property owners and their relatives]; and that any use by, or any benefit for, the general public will be only incidental and purely conjectural . . . ."[149]

The Batts court acknowledged the general rules cited in the Nichols treatise and other authorities to the effect that a taking for the construction of a road typically satisfies the public use requirement.[150] Nevertheless, under the particular facts of that case, it held that the proposed road was "not for a public use," and dismissed the case.[151]

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[145] MCL 229.1.
[146] 144 SE2d 126 (NC 1965),
[147] 144 SE2d at 131.
[148] Id. at 131.
[149] Id. at 136.
[150] Id. at 134-35.
[151] Id. at 137.

The Batts case is by no means an anomaly. See e.g., Maher v Lasater,[152] (holding that the taking of one person's land to create a public road that terminates on another's property was effected for the "private benefit" of the latter, and was therefore unconstitutional); Phillips v Naumann,[153] (holding that it was unconstitutional to "condemn a highway across one landowner's ranch in order to enable [another landowner] to establish a fishing camp or other commercial enterprise on his land"); Kessler v City of Indianapolis,[154] (cited at length by this Court in Shizas, supra, and holding that a taking could not be sustained if its purpose was to take land from one person to provide an access way for another).

Finally, as it did at trial, the City attempts to portray a slippery slope, rhetorically asking whether a taking must benefit two, ten, thirty persons before it will be deemed "public." The argument has superficial appeal, but in fact, it is backwards:

> If a taking had to be considered one for a public use simply by virtue of the fact that it benefits at least one other person, there would be little left to the prohibition against private-use takings.[155]

In sum, the lower courts confirmed that Michigan law sustains the Adells' position, and numerous foreign authorities and treatises underscore the point that illegitimate takings, even for public roads, are not for public use.

C. The Home Rule City Act Does Not Contain A Legislative Finding of Public Use, And Such a Finding Could Not Bind This Court In Any Event

Contrary to the City's claim, the Court of Appeals did not commit any "astonishing error" in observing that the Home Rule City Act ("HRCA")[156] contains no legislative finding that takings for roads are automatically for public use. Municipalities

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[152] 354 SW2d 923, 924, 926 (Tex 1962).
[153] 275 SW2d 464 (Tex 1955).
[154] 157 NE 547, 550 (Ind 1927).
[155] Montgomery v Carter County, 226 F3d 758, 771 (CA 6, 2000).
[156] MCL 117.1 et. seq.

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like the City have no inherent power of eminent domain, but depend upon a delegation of that power from the State.[157] In the HRCA, the State authorized cities to include the power of eminent domain in their **charters**.[158] In contrast with other statutes, including for example the Economic Development Corporations Act at issue in Poletown,[159] the HRCA contains no finding by the Legislature that any taking, for a street or otherwise, is automatically for a public use. Thus, the Court of Appeals' observation that the HRCA contains no legislative finding of public use is not an "astonishing error of law," as the City contends, but is a proper conclusion based on the HRCA's plain language.

The HRCA aside, the City errs in claiming that, if a statute contains a legislative finding that some taking is for a public use, then that is the "end of the public use inquiry as a matter of law."[160] The Adells do not dispute that the City and other governmental agencies are authorized to take property for a public use, and that a public road will be a legitimate public use under most circumstances. But regardless of whether a statute proposes to declare anything a "public use," a legislative declaration to that effect cannot foreclose the judiciary's power to review a taking's constitutionality. Again, this Court has explained for years that whether a proposed taking complies with the constitutional public use limitation is subject to this Court's review.[161] The Court has never abdicated its constitutional role of ensuring that private property may only be taken for a "public use as required by Const 1963, art 10, §2."[162]

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[157] See Edward Rose, supra at 631-32.
[158] See MCL 117.4e.
[159] See Poletown, supra at 630-31.
[160] City's brief at 17.
[161] See Hathcock, supra at 480; Lakehead Pipe Line Co v Dehn, 340 Mich 25, 39; 64 NW2d 903 (1954) ("'The question of whether the proposed use is a public use is a judicial one'"); see also Poletown, supra at 675 n21 (Ryan, J., dissenting) (whether a taking complies with the "public use" limitation is "a question of law for the courts respecting the ambit of the constitutional term of art").

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II. THE COURT OF APPEALS APPLIED TWO DISTINCT PUBLIC USE ANALYSES IN AFFIRMING THE TRIAL COURT'S OPINION

The Court of Appeals issued its opinion in this case on October 4, 2002, prior to this Court's decision in Wayne County v Hathcock,[163] which ultimately overruled Poletown Neighborhood Council v Detroit, supra. The Court of Appeals applied two distinct public use analyses in affirming the trial court's dismissal of the City's complaint.

First, the Court of Appeals compared the primary, and incidental, benefits associated with the City's proposed taking. That approach stems from Michigan Supreme Court case law pre-dating Poletown. Significantly, therefore, that analytical framework remains applicable to this case, and powerfully supports the lower courts' conclusions. Second, to the extent that Hathcock governs this particular case (which both parties question), the Court of Appeals also ruled that the City's taking was impermissible under the "instrumentality of commerce" test ultimately approved by this Court in Hathcock.

A. The Lower Courts' Analyses are Supported By Pre-Poletown Precedent

The trial court dismissed this action, finding that "the proposed industrial spur, A.E. Wisne Drive, is primarily for the benefit of Wisne, which benefit predominates over those to the general public."[164] The Court of Appeals reached the identical conclusion, holding that Wisne's private interest "predominates" over the public benefit which is "speculative and marginal."[165]

That judicial approach to public use did not first appear in Poletown. To the contrary, it was utilized by this Court in cases pre-dating Poletown. In Hathcock, supra,

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[162] Hathcock, supra at 483.
[163] 471 Mich 445; 684 NW2d 765 (2004).

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this Court strenuously disapproved of and overruled Poletown, which permitted a municipality to take private property by eminent domain and then transfer it to a private entity for purposes of economic development. However, this Court did not, and has not, repudiated its pre-Poletown decisions confirming the propriety of comparing the primary and incidental beneficiaries -- as between the public and a private interest -- of a taking. In In Re Slum Clearance,[166] a case decided thirty years before Poletown, this Court used standards virtually identical to those found in the lower courts' analyses in this case:

> Condemnation proceedings for the acquisition of so much and no more property than is necessary for a permissible public use will not be defeated by the mere fact that an incidental private benefit or use of some portion of such property will result.
>
> ***
>
> In the instant case, the resale (abating part of the cost of clearance) is not a primary purpose and is incidental and ancillary to the primary and real purpose of clearance.

See also, In the Matter of the Complaint of the City of Center Line,[167] citing In Re Slum Clearance, supra, and ruling that the Court's role was to discern the "controlling purpose" as between public and private interests.

Likewise, in Berrien Springs Water Power Co. v Berrien Circuit Judge,[168] this Court held that, "[L]and can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved." Interpreting a nearly identical passage from Nichols on Eminent Domain, supra, the Court of Appeals below found that, "This language strongly implies that, if the private benefits *predominate*, rather than merely being incidental, then a city street

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[164] Appellant's Appendix at 302a.
[165] Adell, 253 Mich App at 356.
[166] 331 Mich 714, 721-722; 50 NW2d 340 (1951), citing Cleveland v City of Detroit, 322 Mich 172; 33 NW2d 747 (1948).
[167] 387 Mich 260, 265; 196 NW2d 144 (1972).
[168] 133 Mich 48, 54; 94 NW 379 (1903).

is *not* for a public use."[169]

Similarly, in providing important protection for a private landowner, this Court in Shizas, supra, held that where "the intention to confer a private use or benefit forms *the purpose or a part of the purpose* of the proceeding or taking the power of eminent domain may not be exercised."[170] An investigation into the City's intentions to confer a private use or benefit is precisely the path taken by both lower courts here.

Finally, though decided after Poletown, supra, this Court vigorously reiterated the importance of discerning the predominant, and incidental, beneficiaries of a taking in both Edward Rose ("Although we assume the validity of the public interest advanced by the city, we find that the private interest to be benefited predominates over the asserted public interest");[171] and Tolksdorf ("Hence, the question becomes whether the public interest advanced here, access to landlocked property, is the predominate interest advanced. We find that it is not.")[172] Incidentally, in mentioning Edward Rose's irrelevance to the **statutory** portion of its Hathcock decision, this Court in no way repudiated its lasting **constitutional** ruling in Edward Rose. The Hathcock decision did, however, distinguish federal cases, including Berman v Parker,[173] and yet the City cites that federal case again today seeking judicial review more deferential to the City than that permitted under Michigan law.[174]

In short, in Hathcock this Court clearly explained that Poletown upset a consistent lineage in which the Michigan judiciary had historically enforced the "public use" limitation of the Constitution. That lineage includes decisions by this Court comparing primary, versus incidental, beneficiaries of questioned takings. It was not

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[169] Adell, 253 Mich App at 350 (emphasis in original).
[170] Shizas, 333 Mich at 54.
[171] 442 Mich at 635.
[172] 464 Mich at 9.
[173] 348 US 26, 75 S Ct 98, 99 L Ed 27 (1954).

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that pre-Poletown analytical framework, but rather the Poletown case itself -- which approved condemnation for later transfer to private entities for economic development -- that this Court overruled in Hathcock:

> The question presented here is a fairly discrete one: are the condemnation of defendants' properties and the subsequent transfer of those properties to private entities pursuant to the Pinnacle Project consistent with the common understanding of 'public use' at ratification? For the reasons stated below, we answer that question in the negative.[175]

The comparison of private and public benefits, carefully undertaken by both the trial court and Court of Appeals in this case, is consistent with this Court's longstanding precedent, both pre-and post-Poletown.

B. The Court of Appeals Also Applied the Instrumentality of Commerce Test Later Approved In Hathcock

The Court of Appeals in this action also applied the "instrumentality of commerce" analysis articulated in Justice Ryan's dissenting Poletown opinion.[176] That judicial approach to public use, which served as alternative support for dismissal of the City's taking here, was later approved by this Court in Hathcock. The City now contends that Hathcock is inapplicable because it is "limited to cases where the property is transferred to a third party."[177] The Adells agree that Hathcock does not directly govern this case. It was the City, however, that urged the Court of Appeals to apply the instrumentality of commerce test in the first place.[178] It is only now, after the Court of Appeals applied that test but reached an unfavorable result for the City, that the City casts its lot differently, claiming that the test was inapplicable after all.

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[174] City's brief at 19.
[175] Hathcock, 471 Mich at 471-72.
[176] Adell, 253 Mich App at 343-353.
[177] City's brief at 32.
[178] Appellees' Appendix at 17b.

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In any event, if in this Court's view, Hathcock does apply to this case, then the City's attempted taking here is also foreclosed by the Court of Appeals' alternative, "instrumentality of commerce," analysis.

1. Public Necessity of the Extreme Sort Otherwise Impracticable

The first of three "instrumentality of commerce" inquiries is "public necessity of the extreme sort otherwise impracticable."[179] While this Court in Hathcock identified "highways, railroads, canals"[180] as examples of projects that would be "impracticable" without eminent domain, that principle is based upon the need to create "straight path[s] from point A to point B," and the danger of a single "hold out" upsetting a long stretch of highway, for example.[181]

As the Court of Appeals noted, "This reasoning is perfectly applicable to the Ring Road in this case. We see almost no applicability to A.E. Wisne Drive."[182] The court's distinction makes perfect sense. This was not a situation where one owner out of many was objecting to a proposed taking for the creation of a long public highway. Rather, this matter involved the City's attempt to install a driveway on one person's (the Adells') property to serve another's (Wisne's) facility. With all due respect to the City, its contention that, absent eminent domain, the A.E. Wisne Drive would be "otherwise impracticable,"[183] contradicts the entire trial record in this case: Wisne never approached the Adells seeking another private easement or purchase in fee for a new driveway; the Road Commission never considered installing Wisne's driveway on Wisne's own property; the City never considered any alternative other than taking the Adells' property to build Wisne's driveway. A new driveway for Wisne was hardly

[179] Hathcock, 471 Mich at 473.
[180] Id.
[181] Id.
[182] Adell, 253 Mich App at 352.
[183] City's brief at 33.

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impracticable without eminent domain, as evidenced by its recent construction on Wisne's land. The City's criticism of the Court of Appeals for "offering no factual or other basis for distinction"[184] between the Ring Road, and Wisne's driveway, is indefensible.

In a final effort to satisfy the instrumentality of commerce test's first prong, the City argues that Wisne's "hundreds of employees, vendors, and salespeople" would need the A.E. Wisne Drive on a daily basis.[185] The Adells request that this Court examine the trial record to discern any basis for the City's revisionist factual allegation. It does not exist. The Court of Appeals correctly held that the City could not satisfy the instrumentality of commerce exception on this point alone.

2. Continuing Accountability to the Public

The second instrumentality of commerce inquiry involves continuing accountability to the public.[186] Of course, the City would retain jurisdiction over "A.E. Wisne Drive," but that fact is not dispositive. Otherwise, public ownership alone would immunize this taking, **and all others**, from judicial review. Yet the City's appeal is based upon that very premise, i.e. that a public road is always a public use, suggesting that the "second inquiry," once satisfied, is conclusive.

Importantly, if mere public ownership of a driveway were sufficient to ward off constitutional scrutiny, then in a calamitous twist, condemnors would literally undo Hathcock's significance. Rather than transferring property to third parties for economic development, a practice now foreclosed by Hathcock, condemnors would be unbridled in their right to take property by eminent domain, retain ownership, and confer the identical economic benefits upon a private third party in exchange for, say, a check in

[184] City's brief at 33.
[185] City's brief at 34.

the amount of $200,000 from the third party's president and CEO. It is that unmitigated danger that both the trial court and Court of Appeals preempted in their opinions below.

Clearly, mere public ownership of the taken property cannot, standing alone, fulfill the instrumentality of commerce formulation. If ever a driveway was to be public "in name only,"[187] this was it. The City's manager identified A.E. Wisne Drive as a driveway for Wisne that Wisne would never have to maintain. Wisne agreed to pay $200,000 because its "driveway" would run directly to its front door. The State refused to fund A.E. Wisne Drive because it "appeared to be a driveway" which "disproportionately benefited" private persons. The City misrepresented to the State that the Adells were donating their land for Wisne's driveway. The City "assured" Wisne that the public would not gain access to Wisne's "internal roadway" system because A.E. Wisne Drive would perhaps benefit none other than [Wisne] Industries and General Filters. This is the driveway for which the City seeks immunity from judicial review on the basis that the City would retain ownership of the Adells' land.

3. Facts of Independent Public Significance

Finally, to qualify as an "instrumentality of commerce" the purported taking must be selected on the basis of "facts of independent public significance."[188] According to the Court of Appeals in this case, "[I]t is on this characteristic that A.E. Wisne Drive fails entirely. The record convinces us that the decision to condemn the Adell Trusts' property was made almost entirely with reference to the private interests of Wisne/PICO."[189]

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[186] Hathcock, 471 Mich at 474; Adell, 253 Mich App at 352.
[187] Edward Rose, 192 Mich App at 555.
[188] Hathcock, 471 Mich at 782-783. This test requires that "determination of the specific land to be condemned is made without reference to the private interests of the corporation." Poletown, supra at 680.
[189] Adell, 253 Mich App at 352-353.

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On the sole basis of its 1984 "Ring Road Feasibility Study," the City accuses the Court of Appeals of "complete lack of appreciation" in reaching this conclusion.[190] Again, the City's reasoning is circular: Wisne's allegedly hazardous driveway onto Grand River was to be closed (and has now been replaced). This renders specious the City's rhetorical statement that, "If the study here doesn't count as a fact of 'independent public significance,' nothing ever will."[191] The 1984 study was, and remains, pretextual. See City of Center Line v Chmelko,[192] rejecting a municipality's stated necessity as a "mere pretense." Here, the City's own engineers confirmed: the safety issue is gone.[193] Yet the Study's existence is the only fact that the City invokes as a basis to fulfill the final element of the instrumentality of commerce test.

III. THE LOWER COURTS PROPERLY HELD THAT THE CITY'S PROPOSED TAKING WAS INVALID FOR LACK OF PUBLIC NECESSITY

The parties agree that every taking must satisfy both the constitutional "public use" inquiry, and the statutory necessity standard. The trial court confirmed that the Adells challenged both: "Defendants challenged both the public purpose and necessity of Plaintiff's taking of their property."[194] With respect to public use, the City concedes that "deference to legislative bodies on that score is not required."[195] But the City then exaggerates the deference to which it is entitled in the realm of public necessity. It attempts to veil its improper actions, which dominate the trial record, invoking lofty exhaltations seeking "deference" to municipal decisions. But the statutory standard is straightforward. Under the UCPA, a City's finding of public necessity is defeated by "a

[190] City's brief at 35.
[191] City's brief at 36.
[192] 164 Mich App 251, 262; 416 NW2d 401 (1987).
[193] Appellees' Appendix at 74b.
[194] Appellant's Appendix at 295a.
[195] City's brief at 39.

showing of fraud, error of law, or abuse of discretion."[196]

Once a trial court has rendered its decision on the issue of public necessity, an appellate court "will not reverse the findings and conclusions of the trial court in [such] a condemnation case unless they are clearly erroneous."[197] Contrary to the City's implication, therefore, it is the City, not the Adells, that faces a tall order in seeking reversal of the trial court's dismissal for lack of public necessity, particularly where it was reviewed and affirmed by the Court of Appeals.[198]

A. The Lower Courts Did Not Clearly Err in Holding that the City's Attempted Taking Evidenced Fraud, Error of Law, and/or Abuse of Discretion

On questions of necessity, the judicial role typically does not extend to reviewing the necessity for the project itself. See e.g., Nelson Drainage Dist. v Filippis;[199] City of Troy v Barnard;[200] State Hwy Comm'n v Vanderkloot.[201] For purposes of necessity, therefore, one may assume that Wisne needed a new driveway. But under Vanderkloot, Barnard, and Filippis, and as conceded in the City's brief, judicial review does require consideration of "whether the project needs some or all of the property involved," including "whether the City needs to take this particular property rather than some other property."[202] Put another way, "In reviewing whether a taking is necessary, the consideration is not the advantage to the public, but whether the project needs the property involved."[203]

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[196] MCL 213.56(2).
[197] Nelson Drainage Dist v Filippis, 174 Mich App 400, 403; 436 NW2d 682 (1989); City of Troy v Barnard, 183 Mich App 565, 569; 455 NW2d 378 (1990).
[198] The City urges that the Adells did not file a "cross appeal" on the issue of public necessity. City's brief at 42. As the trial court specifically invoked lack of "public necessity" and UCPA Sec. 6 to support its dismissal of the City's Complaint (Appellant's Appendix at 302a-303a), no cross appeal was required.
[199] 174 Mich App at 404.
[200] 183 Mich App at 569.
[201] 392 Mich 159, 176; 220 NW2d 416 (1974).
[202] City's brief at 42, citing Vanderkloot, Barnard, and Filippis.
[203] Vanderkloot, 392 Mich at 175.

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The City did not need to take the Adells' particular property to build a new driveway for Wisne. In fact, according to the undisputed trial testimony, the City (and Road Commission) never considered the alternative of placing that driveway on Wisne's own property. If that is not an abuse of municipal discretion, then the standard is meaningless. In Vanderkloot, supra, this Court interpreted the term "necessity" in a case involving condemnation for road replacement. The Court recognized the condemnor's duty to consider alternatives, or "variables:"

> Again, the Highway Commission's exercise of discretion in its choice among the variables is subject to judicial review for 'either fraud or abuse of discretion.' Obviously, the variables include whether the land in question is reasonably suitable and necessary for the 'improvement' and whether there is the necessity for taking particular property rather than other property for the purposes of accomplishing the 'improvement.'[204]

Likewise, in City of Troy v Barnard, the city attempted to take defendants' property for construction of a sidewalk. The city argued that the taking was justified by safety purposes, but the court deemed that argument hollow, holding that the city had "abused its discretion" by, among other things, "not considering other alternatives for the construction...."[205]

The present case is worse: the City of Novi not only failed to consider alternatives generally, but dubiously chose not to consider the alternative of using Wisne's own property for Wisne's driveway. The failure to exercise discretion constitutes an abuse thereof: "We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."[206] The City failed to do so. The trial court found that "defendants met their burden of showing that plaintiff city's actions evidence a lack of public necessity by fraud, error of law and/or

[204] Vanderkloot, 392 Mich at 176-177.
[205] Barnard, 183 Mich App at 568-569.

abuse of discretion."[207] The Court of Appeals affirmed the trial court's opinion, holding that, "We agree with its analysis."[208]

The trial court's use of the term "fraud" also was no accident. The City submitted an application for grant funding to the State, under Wisne's "Novi Industries" acronym, affirmatively and falsely stating that the Adells were donating their land to the City's cause. The City's director of public works confirmed that he included the "little private" A.E. Wisne Drive "as a means" to secure state grant funds. The City contended at trial that Wisne would be totally landlocked absent A.E. Wisne Drive, a factually untrue statement. It now claims that, absent A.E. Wisne Drive, Wisne's old driveway could not be replaced, also untrue as evidenced by the actual replacement.

But once again, the City falls back solely upon its 1984 Ring Road study, declaring it the "blueprint" to justify this taking and to excuse the City's serial, unseemly conduct perpetuated at the Adells' expense.[209] The study does not mention eminent domain at all. Even assuming Wisne needed or wanted a new driveway, that fact simply does not equate to a governmental power to take the Adells' land: "If the object can be effected practically as well in some manner other than by appropriating private property, then a taking cannot occur under the guise of eminent domain."[210]

Finally, at trial the City asked the court to disregard its employees' actions and statements because they were "not authorized" by Novi's "City Council."[211] It is disappointing that the City again characterizes those actions as mere "extraneous details" that "might make for lively discussion,"[212] and actually urges that "there is no

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[206] Motor Vehicle Manufacturers Assn. of the United States, Inc. v State Farm, 463 US 29, 48-49; 103 S Ct 2856; 77 L Ed2d 443 (1983).
[207] Appellant's Appendix at 302a.
[208] Adell, 253 Mich App at 356.
[209] City's brief at 46.
[210] Vanderkloot, 43 Mich App 56; 204 NW2d 22 (1972), aff'd, 392 Mich 159; 220 NW2d 416 (1974).
[211] Appellees' Appendix at 78b.
[212] City's brief at 4.

discernible basis....to distinguish the circumstances at issue in this case from those that occur throughout this state on a daily basis....[213] Thankfully, the lower courts disagreed, holding that the City's actions violated the UCPA's standards governing public necessity.

B. The City Improperly Relies Upon Taxation and Assessment Cases to Support Its Eminent Domain Argument

The City goes down a diversionary path, claiming that, if takings must evidence primarily public benefits, municipalities would be hampered in their ability to specially assess property owners for projects that, by definition, benefit specific properties: "What is the effect, for example, of the Court of Appeals opinion on the ability of a municipality to special assess property owners for public improvements?"[214] The City answers its question with citations to the same cases it relied upon at the trial and Court of Appeals levels, including Kuick v Grand Rapids,[215] and Dixon Road Group v Novi.[216] But these cases did not involve eminent domain at all. Rather, the courts merely considered special assessments against properties to be benefited by particular infrastructure projects.

This important distinction has been repeatedly recognized in Michigan case law, including the Poletown dissents, in which both Justices Fitzgerald[217] and Ryan[218] distinguished the taxing and taking powers, the latter jurist noting that, "What is public for one is not necessarily public for the other." The Court of Appeals below cited the following, more expansive statement from Justice Ryan's dissenting view:

> The distinction is fully justified. The character of governmental interference with the individual in the case of taxation is wholly different

[213] City's brief at 34.
[214] City's brief at 39.
[215] 200 Mich 582; 166 NW 979 (1918).
[216] 426 Mich 390; 395 NW2d 211 (1986).
[217] Poletown, supra at 641.
[218] Poletown, supra at 662, 666.

> from the case of eminent domain. The degree of compelled deprivation of property is manifestly less intrusive in the former case....[219]

The City's attempt to defend its taking with principles borrowed from an unrelated area of the law should likewise be rejected by this Court.

The City's alarmist claims concerning septic systems also fail to withstand examination. The Michigan Court of Appeals has upheld the power of a municipality to compel a landowner's conversion from a septic system to a public sewer for the public interest under its police power to regulate the health, safety and welfare of the community, pursuant to MCL 333.12752. See Bingham Farms v Ferris,[220] ("[t]he legislative policy has dispensed with the need for individual determinations by declaring that septic tanks pose a threat to the public health, and it is beyond the province of the judiciary to quarrel with that judgment"). It is the policy of this State that the connection to "available public sewer systems" at the "earliest reasonable date" is in the public interest. The public interest in this area is particularly great because of the possibility that the failure of a septic system could contaminate not only the landowner's own property, but also neighboring property and public water systems. As such, if a condemnation of one person's land is needed to effectuate a sewer hookup, it would generally be upheld (absent unusual circumstances, such as those present in Filippis, supra, where the court dismissed an attempted taking for a drain for lack of necessity.[221])

And finally, in offering the example of a municipal desire to extend sewer service, the City correctly identifies the panoply of considerations involved: clean water requirements, contamination, public health, and the like. This only serves to

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[219] Adell, 253 Mich App at 342-343, citing Poletown, 410 Mich at 666, Ryan, J., dissenting.
[220] 148 Mich App 212, 218; 384 NW2d 129 (1985).
[221] 174 Mich App 400; 436 NW2d 682 (1989).

emphasize the absence of any consideration of alternatives in this case. At any rate, the City is attempting to equate this case, involving eminent domain where the City considered no alternatives and offered a pretextual safety argument, to police power cases involving special assessments, public health issues, and full consideration of alternatives. There is simply no logical support for the City's threats that the lower court's decisions would have this Court "sit as a super health board," or that they "risk a significant increase in the dockets of the Courts in this State."[222]

CONCLUSION AND RELIEF REQUESTED

In this condemnation action, the trial court observed twelve witnesses and reviewed the parties' exhibits during a three-day bench trial. The court then issued a lengthy Opinion and Order, replete with citations to the trial record and a thorough analysis of Michigan eminent domain principles. In that Opinion, the trial court found that "overwhelming" evidence proved the City's fraud, abuse of discretion, and/or error of law, and that any public benefits attendant to this taking were clearly secondary to those accruing to Wisne, a private company.

In a unanimous published opinion authored by its Chief Judge, the Court of Appeals agreed. The City now asks this Court to substitute its own judgment for that of the trial court, and to reverse the Court of Appeals' well-reasoned legal analysis. The lower courts, however, did not commit "clear error," which is the controlling standard of review on the issue of public necessity. Further, with respect to public use, the Court of Appeals correctly applied standards that long pre-dated Poletown, as

[222] City's brief at 41.

well as the instrumentality of commerce framework later approved by this Court in Hathcock. The Adells respectfully request that this Court affirm.

Respectfully submitted,

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Dated: February 10, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

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Appeal from the Court of Appeals
The Honorable William C. Whitbeck, Peter D. O'Connell and Patrick M. Meter

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

vs.

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendants-Appellees.

/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

AFFIDAVIT OF GEORGE E. BEVERST

Respectfully submitted,

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AFFIDAVIT OF GEORGE E. BEVERST

George E. Beverst, being first duly sworn, states as follows under oath:

1. I have personal knowledge of the facts set forth in this Affidavit, and if called as a witness I could competently testify to them.

2. I am a professional photographer, and the principal of Beverst Legal Photo-Video.

3. On December 22, 2004, I personally took the photograph identified as Appellees' Appendix at 80b.

George E. Beverst

Subscribed and sworn to before me on this
10th day of February, 2005.

Mary A. Fontana, Notary Public
Macomb County, Michigan
My Comm. Expires: July 10, 2005